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No. 03-637

In the Supreme Court of the United States

NEWDUNN ASSOCIATES, LLP; ORION ASSOCIATES; NORTHWEST CONTRACTORS CORPORATION,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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EPA Press Release: *EPA and Army Corps Issue Wetlands Decision*, (December 16, 2003) 2

Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, Committee on Government Reform, House of Representatives, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297 (February 27, 2004) 1, 2

SUPPLEMENTAL BRIEF FOR PETITIONERS

In our Petition, we provided numerous examples of the Corps' arbitrary jurisdictional decisions and demonstrated that without this Court's guidance "landowners' property rights will continue to be determined on an arbitrary, *ad hoc* basis, with inconsistent results from different Corps divisions and courts throughout the country." Petition 19. Counsel for the U.S. Corps of Engineers dismissed the "stray language quoted by petitioners" and argued that the examples "wholly fail[] to suggest a pattern of arbitrary conduct." U.S. Br. 20.

In a report released since we filed our Reply, however, the United States General Accounting Office confirmed that the Corps' districts differ significantly in how they interpret and apply the federal regulations when determining which waters and wetlands are subject to federal jurisdiction. Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, Committee on Government Reform, House of Representatives, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297 (February 27, 2004) ("GAO Report").

The GAO Report is based upon an "in-depth examination of [the] jurisdictional determination practices" in 16 of the Corps' 38 district offices. *Id.* at 31. During its investigation, the GAO discovered "several differences in the practices Corps districts use to make jurisdictional determinations." *Id.* at 17. An official at the Corps' Portland District even admitted "that if he asked three different district staff to make a jurisdictional determination, he would probably get three different assessments." *Id.* at 22. As described by the GAO, such inconsistency is the norm.

For instance, although the Rock Island District was instructed by Corps headquarters not to use man-made "drain tiles" to establish jurisdictional connections, *Id.* at 25, the

Chicago District routinely uses drain tiles to establish jurisdiction. *Id.* at 24. The GAO Report cites numerous examples of inconsistent regulatory approaches. Furthermore, unlike its counsel, the Corps does not deny the haphazard nature of its exercise of authority.

Indeed, the Corps admitted to the GAO that the regulatory definitions used to make the critical jurisdictional determinations that underlie the Section 402 and 404 permitting programs are *intentionally* vague. *Id.* at 26. Accordingly, "Corps headquarters officials told [the GAO] that the existence of differences in jurisdictional determination practices among Corps districts is not surprising." *Id.*

After reviewing the GAO Report, the Assistant Secretary of the Army (Civil Works) concurred with the GAO's conclusions. *Id.* at 37. Particularly relevant to this case, the Assistant Secretary agreed that:

> the existing regulations do not contain a definition of the term 'tributaries', nor do they explain how 'adjacency' is to be established for purposes of Clean Water Act jurisdiction. This absence of clarity has led field personnel to draw different conclusion about the meaning of these terms and whether or not they cover certain manmade conveyances, such as certain ditches and pipes.

Id. at 37. Despite the acknowledged lack of regulatory clarity, the government has refused to engage in further rulemaking to clarify the basis for jurisdictional determinations. EPA Press Release: *EPA and Army Corps Issue Wetlands Decision*, (December 16, 2003).

Accordingly, this Court must provide the guidance that is so evidently and desperately needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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